MONTANA LEGISLATIVE HISTORY

Chapter 459 19 93

Bill H _____ S 258 Original bill & history ✓ C

| H. Committee on Select Comm. on Work. Comp. | | | S. Committee on Judiciary | | |
|---|---|---|---|---|---|
| Hearing Date(s) | Mar 05 | ✓ C | Hearing Date(s) | Feb 05 | ✓ C |
| | Mar 08 | ✓ C | | Feb 09 | ✓ C |
| | | C | | | C |
| | | C | | | C |
| Date Out | Mar 10 | ✓ C | | Feb 09 | ✓ C |

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

SO HOUSE ACTUALLY RETURNED THIS BILL
TO SENATE WITH NO CHANGES. THEREFORE,
NO VOTE ON WHETHER OR NOT TO CONCUR
WITH HOUSE AMENDMENTS WAS NEEDED.)

| | | | |
|---|---|---|---|
| 4/24 | SIGNED BY PRESIDENT | | |
| 4/28 | SIGNED BY SPEAKER | | |
| 4/28 | TRANSMITTED TO GOVERNOR | | |
| 5/03 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 605 | | |
| | EFFECTIVE DATE: 07/01/93 | | |

SB 258 INTRODUCED BY HARP

CLARIFY WORKERS' COMPENSATION SUBROGATION RIGHTS

BY REQUEST OF SENATE JUDICIARY COMMITTEE

| | | | |
|---|---|---|---|
| 1/26 | INTRODUCED | | |
| 1/26 | REFERRED TO JUDICIARY | | |
| 1/26 | FIRST READING | | |
| 2/05 | HEARING | | |
| 2/10 | COMMITTEE REPORT—BILL PASSED | | |
| 2/11 | 2ND READING PASSED | 49 | 0 |
| 2/12 | 3RD READING PASSED | 49 | 1 |
| | TRANSMITTED TO HOUSE | | |
| 2/23 | REFERRED TO WORKERS' COMP SELECT COMMITTEE | | |
| 2/23 | FIRST READING | | |
| 3/05 | HEARING | | |
| 3/11 | COMMITTEE REPORT—BILL CONCURRED AS AMENDED | | |
| 3/27 | 2ND READING CONCURRED | 89 | 2 |
| 3/30 | 3RD READING CONCURRED | 97 | 2 |
| | RETURNED TO SENATE WITH AMENDMENTS | | |
| 4/05 | 2ND READING AMENDMENTS CONCURRED | 50 | 0 |
| 4/06 | 3RD READING AMENDMENTS CONCURRED | 50 | 0 |
| 4/13 | SIGNED BY PRESIDENT | | |
| 4/13 | SIGNED BY SPEAKER | | |
| 4/16 | TRANSMITTED TO GOVERNOR | | |
| 4/21 | SIGNED BY GOVERNOR | | |
| | CHAPTER NUMBER 459 | | |
| | EFFECTIVE DATE: 10/01/93 | | |

SB 259 INTRODUCED BY HARP

CLARIFY COST OF RELOCATING OVERHEAD UTILITY LINE

BY REQUEST OF SENATE JUDICIARY COMMITTEE

| | | | |
|---|---|---|---|
| 1/26 | INTRODUCED | | |
| 1/26 | REFERRED TO JUDICIARY | | |
| 1/26 | FIRST READING | | |
| 2/09 | HEARING | | |
| 2/10 | COMMITTEE REPORT—BILL PASSED | | |
| 2/11 | 2ND READING PASSED | 34 | 15 |
| 2/12 | 3RD READING PASSED | 39 | 11 |
| | TRANSMITTED TO HOUSE | | |
| 2/23 | REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION | | |
| 2/23 | FIRST READING | | |
| 3/02 | HEARING | | |
| 3/05 | COMMITTEE REPORT—BILL CONCURRED | | |
| 3/09 | 2ND READING CONCURRED | 87 | 11 |
| 3/11 | 3RD READING CONCURRED | 87 | 11 |
| | RETURNED TO SENATE | | |
| 3/16 | SIGNED BY PRESIDENT | | |

SENATE BILL NO. 258

INTRODUCED BY HARP
BY REQUEST OF THE SENATE JUDICIARY COMMITTEE

IN THE SENATE

| | |
|---|---|
| JANUARY 26, 1993 | INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY. |
| | FIRST READING. |
| FEBRUARY 10, 1993 | COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED. |
| | PRINTING REPORT. |
| FEBRUARY 11, 1993 | SECOND READING, DO PASS. |
| FEBRUARY 12, 1993 | ENGROSSING REPORT. |
| | THIRD READING, PASSED. AYES, 49; NOES, 1. |
| | TRANSMITTED TO HOUSE. |

IN THE HOUSE

| | |
|---|---|
| FEBRUARY 23, 1993 | INTRODUCED AND REFERRED TO SELECT COMMITTEE ON WORKERS' COMPENSATION. |
| | FIRST READING. |
| MARCH 11, 1993 | COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED. |
| MARCH 27, 1993 | SECOND READING, CONCURRED IN. |
| MARCH 30, 1993 | THIRD READING, CONCURRED IN. AYES, 97; NOES, 2. |
| MARCH 31, 1993 | RETURNED TO SENATE WITH AMENDMENTS. |

IN THE SENATE

| | |
|---|---|
| APRIL 5, 1993 | SECOND READING, AMENDMENTS CONCURRED IN. |
| APRIL 6, 1993 | THIRD READING, AMENDMENTS CONCURRED IN. |

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

LC 1158/01

Senate BILL NO. 258

INTRODUCED BY HARP

BY REQUEST OF THE SENATE JUDICIARY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT A WORKERS' COMPENSATION INSURER IS ENTITLED TO SUBROGATION UNLESS THE INJURED EMPLOYEE IS ABLE TO DEMONSTRATE DAMAGES IN EXCESS OF THE WORKERS' COMPENSATION BENEFITS AND THE THIRD-PARTY RECOVERY COMBINED; AND AMENDING SECTION 39-71-414, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-71-414, MCA, is amended to read:

"**39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.

(2) (a) If the injured employee intends to institute the ~~third-party~~ third-party action, ~~he~~ the employee shall give the insurer reasonable notice of ~~his~~ the intention to institute the action.

(b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost of the action, including ~~attorneys'~~ attorney fees.

(c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by this section.

(d) If the injured employee or the employee's personal representative institutes the action, the employee is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of reasonable costs, including ~~attorneys'~~ attorney fees, if the amount of recovery is insufficient to provide the employee with that amount after payment of subrogation.

(3) If an injured employee refuses or fails to institute the ~~third-party~~ third-party action within 1 year from the date of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any amount received by judgment or settlement ~~which~~ that is in excess of the amounts paid or to be paid under the Workers' Compensation Act after the insurer's reasonable costs, including ~~attorneys'~~ attorney fees for prosecuting the action, have been deducted from the recovery.

(4) An insurer may enter into compromise agreements in

settlement of subrogation rights.

(5) Regardless of whether the amount of compensation and other benefits payable under the Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal representative may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by the department.

(6) (a) The insurer is entitled to full subrogation rights under this section, ~~even-though~~ unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. ~~The--insurer--may-subrogate-against-the-entire-settlement-or award-of-a-third-party-claim-brought-by-the-claimant-or--his personal-representative,-without-regard-to-the-nature-of-the damages.~~

(b) If ~~no~~ a survival action ~~exists~~ does not exist and the parties reach a settlement of a wrongful death claim without apportionment of damages by a court or jury, the insurer may subrogate against the entire settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a party to the settlement agreement.

(7) Regardless of whether the amount of compensation





and other benefits payable have been fully determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by the department."

-End-

# MINUTES

## MONTANA SENATE
## 53rd LEGISLATURE - REGULAR SESSION

## COMMITTEE ON JUDICIARY

**Call to Order:** By Senator Doherty, on February 5, 1993, at 10:08 a.m.

## ROLL CALL

**Members Present:**

Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

**Members Excused:** Sen. Yellowtail

**Members Absent:** NONE

**Staff Present:** Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing: SB 252
SB 251
SB 258

Executive Action: SB 251

## HEARING ON SB 252

**Opening Statement by Sponsor:**
Senator Hertel, District 15, said SB 252 is important to land surveyors. The title of SB 252 is an act exempting a professional surveyor or other qualified persons from the criminal trespass law when entry to land is for survey purposes." When conducting a land survey, a surveyor must go on the property adjacent to the land being surveyed, to find the monuments or

**Closing by Sponsor:**

Senator Towe closed SB 251.

## EXECUTIVE ACTION ON SB 251

**Motion/Vote:**
Senator Towe moved SB 251 DO PASS. The motion CARRIED UNANIMOUSLY.

## HEARING ON SB 258

**Opening Statement by Sponsor:**
Senator Harp, District 4, opened SB 258.

**Proponents' Testimony:**
Laurence Hubbard, State Compensation Mutual Insurance Fund, supports SB 258 with an amendment. (Exhibit #7) Mr. Hubbard said the present bill goes beyond a supreme court decision in second sentence of section six A, which permits subrogation when allowed against the entire settlement for award regardless of the nature of the damages. Allowing subrogation against the entire settlement, regardless of the nature of the damages, is consistent with supreme court decisions. Prior law which was codified in sub section six A, was not touched by the Supreme Court, which is what is being addressed today. The State Compensation Mutual Insurance Fund believes the second sentence, which is presently omitted, should be reinserted to read "the insurer may subrogate against the entire settlement for award of a third party claim brought by a plaintiff or their personal representative without regard to the nature of the damages."

Oliver Goe, Montana Municipal Insurance Association, Montana Association of Counties, Montana School Groups Insurance Authority, supports SB 258 with the amendment proposed by the State Fund. Mr. Goe said subrogation has interfered with the ability to collect from a third party. Mr. Goe feels that SB 258 may not go far enough to insure that workers compensation insurers would be entitled to subrogation.

Jacqueline Lenmark, American Insurance Association, reiterated the proponents comments. Ms. Lenmark asked the Committee for a DO PASS recommendation.

**Opponents' Testimony:**
Russell Hill, Montana Trial Lawyers Association, told the Committee he would be reserve judgement on the amendments.

**Questions From Committee Members and Responses:**
Senator Halligan asked Mr. Goe to elaborate on SB 258. Mr. Goe said the problem with subrogation is that it limits the circumstances in which an insurer can obtain subrogation. Most Supreme Court decisions are premised on that a portion of the Montana Constitution regarding full legal redress. That impacts the ability of the claimant who is paying full legal redress against the third party in a district court. After a proceeding to figure out how much the person was damaged, what the person has received, and what they would receive under workman's compensation, then the insurer has subrogation rights. Mr. Goe said at the present time most insurers do not pursue subrogation. Mr. Goe said SB 258 would help those insurers with subrogation.

Senator Doherty asked Mr. Goe to define subrogation. Mr. Goe said subrogation is a concept which means that the insurer could recover benefits that were paid out to a claimant, from a third party who was responsible for the injury.

Senator Towe asked Mr. Hubbard about the proposed amendment. Mr. Hubbard said the intent of the amendment is so a third party would not be able to designate a recovery when the insurer is entitled to subrogation. The supreme court, in the past, allowed subrogation regardless of how the parties designated a third party's settlement for damages.

Senator Towe asked Mr. Hubbard if that was why the language says "without regard to the nature of damages." Mr. Hubbard said that was correct.

Senator Towe asked Mr. Hubbard if the Supreme Court used that language to authorize settlements. Mr. Hubbard said before the statute, the Supreme Court held that regardless of how the parties designated damages, subrogation would apply to the entire amount.

Senator Towe asked Mr. Hubbard with regard to subrogation, about workman's compensation and a third party paying for damages. Mr. Hubbard said the legislature intended to grant subrogation regardless whether the worker could demonstrate damages in excess of the compensation benefits and third party recoveries. The courts did not agree. The court held that workers were entitled to be made whole for the full extent of their injuries. The present statute attempts to clarify the language by inserting the word "unless," and striking "even though."

Senator Towe asked Mr. Hubbard about payment by workman's compensation. Mr. Hubbard said the theory of the subrogation statute is, if a worker can prove they were not made whole by recovery, of the workmans compensation benefits, subrogation would not be available to the insurer.

Senator Towe asked Mr. Hubbard whether the rule about notification by the Workers Compensation Division was still in

the statute. Mr. Hubbard said the rule was still in the statute. Mr. Hubbard said subrogation should be based on total recovery, regardless of how the private parties decide to attribute damages. Mr. Nash said that is why the amendment was proposed.

Senator Bartlett asked Mr. Hubbard about the proposed amendment and inserting "if subrogation was allowed." Mr. Hubbard said that is the intent of SB 258. Mr. Hubbard said in cases where subrogation is allowed and obtained that sentence would apply, and it would be without regard to the nature of the damages for the third party.

Senator Rye asked Russell Hill about the amendments. Mr. Hill said he looked at the amendments, and feels that anytime law remains the way it is, something is gained.

**Closing by Sponsor:**
Senator Harp closed.

**ADJOURNMENT**

**Adjournment:** 11:15 a.m.

Wm Yellowtail
BILL YELLOWTAIL, Chair

Rebecca Court
REBECCA COURT, Secretary

BY/rc

# ROLL CALL

SENATE COMMITTEE Judiciary DATE 2-5-93

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| Senator Yellowtail | | | X |
| Senator Doherty | X | | |
| Senator Brown | X | | |
| Senator Crippen | X | | |
| Senator Grosfield | X | | |
| Senator Halligan | X | | |
| Senator Harp | X | | |
| Senator Towe | X | | |
| Senator Bartlett | X | | |
| Senator Franklin | X | | |
| Senator Blaylock | X | | |
| Senator Rye | X | | |
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Attach to each day's minutes

Amendments to S.B. 258

1. Page 3, line 14
Following: "combined."
Insert: "The insurer may subrogate against the entire settlement or award of a third party claim brought by the claimant or his personal representative without regard to the nature of the damages."

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 2-5-92
BILL NO. SB 253

DATE 2-5-93

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: S.B. 251 - Tow S.B. 252 - Hertel

SB 258 - Doty

| Name | Representing | Bill No. | Check One Support | Oppose |
|---|---|---|---|---|
| TOM MCNALO | Montana Technical Council | SB252 | ✓ | |
| STEWART NASH | Montana Assoc. of Registered Land Surveyors | 252 | ✓ | |
| HARRY C. STRONG | MT. ASS. REGISTERED LAND SURVEYORS | 252 | ✓ | |
| JEAN E. STRONG | LAND SURVEYOR | SB 252 | ✓ | |
| CRAIG L. HOPPE | MT. MAGISTRATES ASS'N | SB 251 | X | |
| Lawrence A. Hubbard | State Fund | SB 252 | X | X |
| Virginia Mullen | MT Assoc of Land Surveyors | SB 252 | X | |
| Jacqueline J. Lamark | American Fed. Agents | SB 258 | ✓ | |
| [signature] | MMIA, MSGIA, MACO | " " | ✓ | |
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# VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

# MINUTES

## MONTANA SENATE
## 53rd LEGISLATURE - REGULAR SESSION

## COMMITTEE ON JUDICIARY

**Call to Order:** By Senator Bill Yellowtail, on February 9, 1993, at 10:06 a.m.

## ROLL CALL

**Members Present:**

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

**Members Excused:** NONE

**Members Absent:** NONE

**Staff Present:** Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

| | |
|---|---|
| Hearing: | SB 249 |
| | SB 250 |
| | SB 259 |
| Executive Action: | SB 258 |
| | SB 259 |
| | SB 249 |
| | SB 224 |
| | SB 264 |

## HEARING ON SB 249

**Opening Statement by Sponsor:**
Senator Yellowtail, District 50, told the Committee that SB 249 would bring Montana Statutes in conformance with the law of the land as expressed by the courts.

**Vote:**
The motion to amend SB 224 FAILED By Roll Call Vote.

**Motion:**
Senator Towe moved to amend SB 224. (Exhibit #6)

**Discussion:**
Senator Towe explained the amendment sb022401.avl.

**Vote:**
The motion to amend SB 224 CARRIED UNANIMOUSLY.

**Motion:**
Senator Doherty moved to TABLE SB 224.

**Discussion:**
Senator Doherty told the Committee that there are plenty of hunter safety firearm instruction courses provided already and as a result children are not getting turned down for instruction, and that was his reason to table SB 224.

Senator Towe told the Committee that SB 224 should be tabled, or language should be added, because the Department of Fish, Wildlife, and Parks may be open to further liability if they do not meet reasonable contemporary standards.

Senator Rye told the Committee he would vote against the motion to TABLE SB 224.

Senator Grosfield said he would also vote NO to TABLE SB 224. Senator Grosfield said it is hard to get firearm safety instructors because people are worried about liability. SB 224 goes beyond hunter safety. Hunter safety takes care of the young people, but not other people who want instruction in fire arms. Those people are not going to get that kind of training through a hunter safety course. Senator Grosfield said for those reasons he would vote against the motion to TABLE SB 224.

Chair Yellowtail told the Committee that the trial lawyers pointed out that by passing SB 224 a new liability would be created for all safety instructors. Chair Yellowtail said that should be a major concern in passing SB 224.

**Vote:**
The motion to table SB 224 CARRIED by Roll Call Vote.

## EXECUTIVE ACTION ON SB 258

**Discussion:**
Valencia Lane explained the amendment. Senator Towe suggested on page 3, line 14, following "combined," insert, "The insurer may subrogate against the entire settlement or award of a third party claim brought by the claimant or his personal representative without regard to the nature of the damages."

Valencia Lane told the Committee that Greg Petesch, Code Commissioner, did not feel the sentence was necessary.

Chair Yellowtail noted there was no interest in the Committee to move the amendment.

**Motion/Vote:**
Senator Towe moved SB 258 DO PASS. The motion CARRIED UNANIMOUSLY.

## EXECUTIVE ACTION ON SB 264

**Discussion:**
Valencia Lane explained the amendments. (Exhibit #7)

**Motion:**
Senator Towe moved to amend SB 264.

**Discussion:**
Senator Franklin asked Senator Towe about the requirement of the mental health facility. Senator Towe said SB 264 would continue to require that a mental health facility, other than a state hospital, send notice to the sheriff when a person is released.

Chair Yellowtail said he is concerned about eliminating the requirement that a notice be given in the case of a jail escapee.

Senator Chair asked Senator Towe about reinserting "jail." Senator Towe said he would accept the amendment to reinsert jail on lines 19 and 22 and make the corrections to the title of SB 264.

**Vote:**
The motion to amend SB 264 CARRIED UNANIMOUSLY.

**Motion:**

Senator Towe moved SB 264 DO PASS AS AMENDED.

# ROLL CALL

SENATE COMMITTEE Judiciary DATE 2-9-93

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| Senator Yellowtail | X | | |
| Senator Doherty | X | | |
| Senator Brown | X | | |
| Senator Crippen | X | | |
| Senator Grosfield | X | | |
| Senator Halligan | X | | |
| Senator Harp | X | | |
| Senator Towe | X | | |
| Senator Bartlett | X | | |
| Senator Franklin | X | | |
| Senator Blaylock | X | | |
| Senator Rye | X | | |
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Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT


February 9, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 258 (first reading copy -- white), respectfully report that Senate Bill No. 258 do pass.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

Amd. Coord.
Sec. of Senate

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# MINUTES

## MONTANA HOUSE OF REPRESENTATIVES
## 53rd LEGISLATURE - REGULAR SESSION

## SELECT COMMITTEE ON WORKERS' COMPENSATION

**Call to Order:** By **CHAIRMAN CHASE HIBBARD**, on March 5, 1993, at 3:10 p.m.

### ROLL CALL

**Members Present:**
Rep. Chase Hibbard, Chairman (R)
Rep. Jerry Driscoll, Vice Chairman (D)
Rep. Steve Benedict (R)
Rep. Ernest Bergsagel (R)
Rep. Vicki Cocchiarella (D)
Rep. David Ewer (D)

**Members Excused:** REP. BERGSAGEL

**Members Absent:** None

**Staff Present:** Susan Fox, Legislative Council
Evy Hendrickson, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**
Hearing: SB 164, SB 258
Executive Action: SB 164, HB 604, HB 361 and HB 13

**CHAIRMAN HIBBARD** asked **Linda White** from **Lewistown** to briefly address the committee. She said several months ago a group of employers and employees formed a grassroots group to look at the workers' comp problems. They put hours of work into a survey that went to people in Central Montana. **Ms. White** said they believed that fraud was one of the biggest issues why workers' comp is in trouble. **EXHIBIT 1**

### HEARING ON SB 164

**Opening Statement by Sponsor:**

**SEN. JOHN HARP, Senate District 4, Kalispell,** said the bill was introduced at the request of the Governor. Insurance fraud is a hidden crime and national statistics show that approximately 8% of all premium dollars paid by insurers are attributable to fraud. He said the State Fund itself would be involved along with the Department of Justice. The Department of Justice would

## HEARING ON SB 258

Opening Statement by Sponsor:

**SEN. HARP, Senate District 4, Kalispell,** said the bill was a code commissioner bill and explained the proposed legislation.

Informational Testimony:

**Lawrence Hubbard,** representing the **State Compensation Mutual Insurance Fund,** expressed the Fund's unconditional support for SB 258. **EXHIBITS 6 and 7**

Proponents' Testimony:

**Russell Hill,** representing the **Montana Trial Lawyers' Association (MTLA),** said they strongly supported SB 258 without amendments.

**Oliver Goe,** representing **Montana Municipal Insurance Authority (MMIA), Montana School Groups Insurance Authority (MSGIA)** and the **Montana Association of Counties (MACO),** said they likewise support the bill with the proposed amendments.

**Jacqueline Lenmark,** representing the **American Insurance Association (AIA),** said they supported the bill and amendments as proposed by the state.

Opponents' Testimony: None

Questions From Committee Members and Responses:

**CHAIRMAN HIBBARD** stated that, if the bill passed out of the committee, he would like to see it go directly to the floor of the House.

**CHAIRMAN HIBBARD** asked **Susan Fox, Legislative Council staff person,** to comment on the bill. She said the only substantive change was striking what the amendment proposed to reinsert. Therefore, if the committee adopted the amendment, there would be no reason for the bill, although **Mr. Hubbard** disagreed and said that language was critical to maintaining present law.

**Ms. Fox** said it seemed very little else was changed in the bill and the code commissioner deleted that for a reason; without his presence perhaps it would be better to check with him to see if he agreed. **Mr. Hubbard** said he had testified on this bill before the Senate Judiciary Committee and they were going to ask the code commissioner at that time. He said it was his belief that they had received a response. It was also his understanding that

this was acceptable to members of the Judiciary Committee; it just didn't get done.

**REP. DRISCOLL** asked what the difference between the meaning of "even though" and "unless" was. **Mr. Hubbard** said he didn't think there was a lot of substance to changing the words around and thought it was an attempt to make it clear that subrogation was not entirely out the window although some may argue that it is in light of the court decision. It clarifies that the burden is on the injured worker to prove that damages exceeded both the workers' compensation benefits and the recovery in the third party action.

**REP. DRISCOLL** repeated the question once again. **Mr. Hubbard** said the intent of the change was to conform with the court decision where it said that the insured is not entitled to subrogation under Article 2, section 16 where the injured worker was not made whole. If you leave in "even though," he believed that would be in direct violation of the court's holding. **Mr. Hubbard** said he believes the language "unless" is more innocuous.

**REP. BENEDICT** asked **Mr. Hubbard** if he asked for this amendment and the Senate refused. **Mr. Hubbard** said they did ask for the amendment and the Senate did not put it in. He said the chairman of the Senate Judiciary Committee was going to check with the code commissioner to address the concerns of the State Fund; it was his understanding through discussions with some of the senators that it was more or less an inadvertent failure to amend the statute. **Mr. Hubbard** encouraged that the code commissioner be contacted.

**REP. BENEDICT** asked **Mr. Hubbard** if the Senate committee voted to adopt this amendment. **Mr. Hubbard** said they did not.

**CHAIRMAN HIBBARD** said he had sent for **Greg Petesch,** the Code Commissioner, to clear this up but he was not available. Executive action on the bill was postponed until Monday. **Ms. Fox** was to check with the code commissioner.

Closing by Sponsor:

**SEN. HARP** declined.

## EXECUTIVE ACTION ON SB 164

Motion: **REP. BENEDICT MOVED SB 164 BE CONCURRED IN.**

Motion: **REP. DRISCOLL** moved adoption of the amendment that was handed out by **Darrell Holzer,** page 3, line 22 **EXHIBIT 3.** He said this was going to make this equal for everybody.

**REP. BENEDICT** referred to page 3, line 10 & 11 and said it would

HOUSE OF REPRESENTATIVES
53RD LEGISLATURE - 1993
SELECT COMMITTEE ON WORKERS COMPENSATION

ROLL CALL DATE 2-5-93

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| CHASE HIBBARD, CHAIRMAN | ✓ | | |
| JERRY DRISCOLL, VICE CHAIRMAN | ✓ | | |
| STEVE BENEDICT | ✓ | | |
| ERNEST BERGSAGEL | | | ✓ |
| VICKI COCCHIARELLA | ✓ | | |
| DAVID EWER | ✓ | | |
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EXHIBIT 4
DATE 3/5/93
SB 258

Testimony on Senate Bill 258
For the Select Committee on Workers' Compensation

Prepared by Laurence A. Hubbard
State Compensation Mutual Insurance Fund
March 5, 1993

Mr. Chairman, members of the House Select Committee, my name is Laurence Hubbard. I am here today on behalf of the State Compensation Mutual Insurance Fund to express conditional support for SB 258. I also presented similar testimony on this Bill before the Senate Judiciary Committee.

It is our understanding that SB 258 was drafted by the Legislative Council in response to the recent Supreme Court decision in Francetich v. State Fund (March 10, 1992). I represented the State Fund in that case, and believe I can offer some insight into the reason for SB 258. It appears that this Bill attempts to codify the holding of the Francetich case that stuck down as unconstitutional section (6) (a) of the present statute. That statute allowed the workers' compensation insurer full subrogation (which is legal jargon for the right of the insurer who has paid money which the third-party wrongdoer ought to have paid, to step into the shoes of the injured worker) for any money paid under the Workers' Compensation Act, when the injured worker recovers money against a third party wrongdoer in a personal injury claim. Subrogation was allowed even if the injured worker was able to demonstrate that his or her damages exceeded the benefits received under the Workers' Compensation Act, and the third-party recovery combined. In Francetich, the Court held that provision of the statute violated Art. II, Sec. 16 of the Montana Constitution. The Court's holding specifically states:

> We hold that in a case of reasonably clear liability [of the third-party] where a claimant is forced to settle for the limits of an insurance policy which, together with claimant's workers' compensation award, do not grant full legal redress [make the injured worker whole] under general tort law to the claimant, under workers' compensation laws the insurer is not entitled to subrogation rights under Section 39-71-414, MCA.

Senate Bill 258 attempts to amend the statute to conform with the Court's holding in Francetich. However, we believe the present Bill goes beyond the Court's decision by striking the second sentence of section (6) (a), which permits subrogation, when otherwise available to the insurer, against the entire settlement or recovery regardless of the nature of the damages. Nothing in the Court's decision addressed that principal. In fact, allowing subrogation against the entire recovery regardless of how private litigants designate the damages is consistent with prior Supreme Court decisions in Swanson v. Champion International, 197 Mont. 509 (1982), and Butori v. Bruce Metcalf Sportsman, 740 P.2d 1126 (1987).

For the forgoing reasons, the State Fund with the concurrence of the Bill's sponsor, Sen. John Harp, requests that the Bill be amended by this Committee to reinsert the second sentence of Section 39-71-414 (6) (a), to read: "The insurer may subrogate against the entire settlement or award of a third party claim brought by the claimant or his personal representative, without regard to the nature of damages."

Thank you.

EXHIBIT 6
DATE 3/5/93
SB 258

EXHIBIT 1
DATE 3-5-93
HB SB 258

Amendments to S.B. 258

1. Page 3, line 14
Following: "combined."
Insert: "The insurer may subrogate against the entire settlement or award of a third party claim brought by the claimant or his personal representative without regard to the nature of the damages."

# MINUTES

## MONTANA HOUSE OF REPRESENTATIVES
## 53rd LEGISLATURE - REGULAR SESSION

## SELECT COMMITTEE ON WORKERS' COMPENSATION

**Call to Order:** By **CHAIRMAN CHASE HIBBARD**, on March 8, 1993, at 3:10 p.m.

### ROLL CALL

**Members Present:**
Rep. Chase Hibbard, Chairman (R)
Rep. Jerry Driscoll, Vice Chairman (D)
Rep. Steve Benedict (R)
Rep. Ernest Bergsagel (R)
Rep. Vicki Cocchiarella (D)
Rep. David Ewer (D)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Susan Fox, Legislative Council
Evy Hendrickson, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**
Hearing: SB 394
Executive Action: HB 456, HB 504, HB 628, SB 258

### HEARING ON SB 394

Opening Statement by Sponsor:

**SEN. JOHN HARP, Senate District 4, Kalispell,** said SB 394 is a bill that would enact into law the amount of money an attorney can receive under workers' compensation. The language in this bill is currently in the rules at the Department of Labor. He then referred to the bill section by section. He said basically what the bill does is limit the attorney's fee to 20% in a workers' compensation case when there is no hearing, and to 25% when the case is heard by the workers' compensation judge or goes to court. This establishes a cap for an attorney's fee not to exceed $7,500 per claim and reduces the percentage the attorney can receive from 20% or 25% to 15%.

**SEN. HARP** said it used to be between an employer and employee to work out a system for workers' comp settlement and eventually the purpose is to eliminate the need for attorneys. He said it appears the settlements have somewhat stabilized because in 1991

**REP. DRISCOLL** said it was a state debt caused by what we have done in the past. We are imposing this 2.8 on people who had no part in it; but some of the people who may have had a part in it and are now out of it, the so-called non-covered employment, they should pay if it is a state debt. He said all this does is include everyone and people who may or may not have had a part in it are going to be taxed too.

**REP. EWER** said we are debating what can be established and what the facts are. We have all kinds of resources to determine the facts so maybe we should get those facts by next Wednesday. **REP. BENEDICT** said he went to the Legislative Auditor because he wanted to find out who is not paying the payroll tax and they came up with people they could get between $700 and $1.3 billion and the rest could not be found. **REP. DRISCOLL** asked why they couldn't get everybody except military and civilian federal employment. He said Indians on the reservations should not be in the $7.9 billion and federal military also should not be in but federal civilians pay income tax.

**CHAIRMAN HIBBARD** called on **Ms. Maharg** and asked if she could determine by Wednesday, based on the $7.9 billion non-farm wages, what may be available to tax in a payroll tax so we know what the true facts are. **Ms. Maharg** said she would research the problem and get a response back to the committee.

**CHAIRMAN HIBBARD** said action would be put off on **REP. DRISCOLL'S** amendments **EXHIBIT 12** until Wednesday and he asked what **REP. BENEDICT** wished to do with this bill. **REP. BENEDICT** said he would like to hold it until Wednesday.

**CHAIRMAN HIBBARD** said the committee will postpone, without objection, executive action on HB 504 until Wednesday.

## EXECUTIVE ACTION ON SB 258

Motion: **REP. BENEDICT** moved the amendment.

Discussion: **CHAIRMAN HIBBARD** said the State Fund attorneys were in attendance to address this.

**Mr. Lawrence Hubbard,** representing the **State Fund,** said he testified on SB 258 with a proposal that the second sentence of Section 6 be reinserted. He said there were some concerns expressed by the code commissioner whether that would achieve what is required under the bill to be in compliance with the Supreme Court ruling. He met with **Greg Petesch, Code Commissioner,** and they discussed potential ways to resolve the conflict. They agreed with the amendments beginning on line 15, "if the insurer is entitled to subrogation under this section the insurer may subrogate," etc. He said **Mr. Petesch** said that would solve the concerns of the code commissioner. **Mr. Hubbard** said

that **SEN. HARP** was concerned with the proposed amendment by the State Fund.

**Vote**: Voice vote. Motion carried unanimously.

**Motion**: **REP. BENEDICT MOVED SB 258 DO PASS AS AMENDED.** Motion carried unanimously. **EXHIBIT 14**

## ADJOURNMENT

**Adjournment:** 5:50 p.m.

REP. CHASE HIBBARD, Chairman

EVY HENDRICKSON, Secretary
by Marilyn Miller

CH/ev

HOUSE OF REPRESENTATIVES
53RD LEGISLATURE - 1993
SELECT COMMITTEE ON WORKERS COMPENSATION

ROLL CALL DATE 3-8-93

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| CHASE HIBBARD, CHAIRMAN | ✓ | | |
| JERRY DRISCOLL, VICE CHAIRMAN | ✓ | | E |
| STEVE BENEDICT | ✓ | | |
| ERNEST BERGSAGEL | ✓ | | |
| VICKI COCCHIARELLA | ✓ | | |
| DAVID EWER | ✓ | | |
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HOUSE SELECT COMMITTEE REPORT

March 10, 1993


Mr. Speaker: We, the select committee on Workers' Compensation report that Senate Bill 258 (third-reading copy -- blue) be concurred in as amended .

Signed: Chase Hibbard , Chair

And, that such amendments read: Carried by: Rep. Ewer

1. Page 3, line 18.
Following: "~~damages.~~"
Insert: "If the insurer is entitled to subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages."

-END-

Committee Vote:

EXHIBIT 13
DATE 3/8/93
~~HB~~ SB 258

Amendments to Senate Bill No. 258
Third Reading Copy

For the Committee on Workers' Compensation

Prepared by Susan B. Fox
March 8, 1993

1. Page 3, line 18.
Following: "~~damages.~~"
Insert: "If the insurer is entitled to subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages."

Ng committee report
go directly to
floor - no
referral

EXHIBIT 14
DATE 3/8/93
~~HB~~ SB 258

HOUSE OF REPRESENTATIVES
53RD LEGISLATURE - 1993
SELECT COMMITTEE ON WORKERS COMPENSATION

ROLL CALL VOTE

DATE 3-8-93 BILL NO. SB 258 NUMBER

MOTION: Do Pass as Amended

| NAME | AYE | NO |
|---|---|---|
| CHASE HIBBARD, CHAIRMAN | ✓ | |
| JERRY DRISCOLL, VICE CHAIRMAN | ✓ | |
| STEVE BENEDICT | ✓ | |
| ERNEST BERGSAGEL | ✓ | |
| VICKI COCCHIARELLA | ✓ | |
| DAVID EWER | ✓ | |
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SENATE BILL NO. 258

INTRODUCED BY HARP

BY REQUEST OF THE SENATE JUDICIARY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT A WORKERS' COMPENSATION INSURER IS ENTITLED TO SUBROGATION UNLESS THE INJURED EMPLOYEE IS ABLE TO DEMONSTRATE DAMAGES IN EXCESS OF THE WORKERS' COMPENSATION BENEFITS AND THE THIRD-PARTY RECOVERY COMBINED; AND AMENDING SECTION 39-71-414, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-71-414, MCA, is amended to read:

"**39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.

(2) (a) If the injured employee intends to institute the ~~third-party~~ third-party action, ~~he~~ the employee shall give the insurer reasonable notice of ~~his~~ the intention to institute the action.

(b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost of the action, including ~~attorneys'~~ attorney fees.

(c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by this section.

(d) If the injured employee or the employee's personal representative institutes the action, the employee is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of reasonable costs, including ~~attorneys'~~ attorney fees, if the amount of recovery is insufficient to provide the employee with that amount after payment of subrogation.

(3) If an injured employee refuses or fails to institute the ~~third-party~~ third-party action within 1 year from the date of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any amount received by judgment or settlement ~~which~~ that is in excess of the amounts paid or to be paid under the Workers' Compensation Act after the insurer's reasonable costs, including ~~attorneys'~~ attorney fees for prosecuting the action, have been deducted from the recovery.

(4) An insurer may enter into compromise agreements in

settlement of subrogation rights.

(5) Regardless of whether the amount of compensation and other benefits payable under the Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal representative may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by the department.

(6) (a) The insurer is entitled to full subrogation rights under this section, ~~even-though~~ unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. ~~The--insurer--may-subrogate-against-the-entire-settlement-or award-of-a-third-party-claim-brought-by-the-claimant-or--his personal-representative,-without-regard-to-the-nature-of-the damages.~~ IF THE INSURER IS ENTITLED TO SUBROGATION UNDER THIS SECTION, THE INSURER MAY SUBROGATE AGAINST THE ENTIRE SETTLEMENT OR AWARD OF A THIRD-PARTY CLAIM BROUGHT BY THE CLAIMANT OR THE CLAIMANT'S PERSONAL REPRESENTATIVE WITHOUT REGARD TO THE NATURE OF THE DAMAGES.

(b) If ~~no~~ a survival action ~~exists~~ does not exist and the parties reach a settlement of a wrongful death claim without apportionment of damages by a court or jury, the





insurer may subrogate against the entire settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a party to the settlement agreement.

(7) Regardless of whether the amount of compensation and other benefits payable have been fully determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be allocated under subrogation. Upon review and approval by the department, the agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by the department."

-End-